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IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

**STATE OF CALIFORNIA BY AND THROUGH
 ATTORNEY GENERAL XAVIER BECERRA AND
 CALIFORNIA STATE WATER RESOURCES
 CONTROL BOARD, STATE OF NEW YORK,
 STATE OF CONNECTICUT, STATE OF ILLINOIS,
 STATE OF MAINE, STATE OF MARYLAND,
 STATE OF MICHIGAN, STATE OF NEW JERSEY,
 STATE OF NEW MEXICO, STATE OF NORTH
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 OF RHODE ISLAND, STATE OF VERMONT,
 STATE OF WASHINGTON, STATE OF
 WISCONSIN, COMMONWEALTHS OF
 MASSACHUSETTS AND VIRGINIA, THE NORTH
 CAROLINA DEPARTMENT OF
 ENVIRONMENTAL QUALITY, THE DISTRICT OF
 COLUMBIA, AND THE CITY OF NEW YORK,**

Plaintiffs,

v.

**ANDREW R. WHEELER, AS ADMINISTRATOR
 OF THE UNITED STATES ENVIRONMENTAL
 PROTECTION AGENCY; UNITED STATES
 ENVIRONMENTAL PROTECTION AGENCY; R.
 D. JAMES, AS ASSISTANT SECRETARY OF THE
 ARMY FOR CIVIL WORKS; AND UNITED
 STATES ARMY CORPS OF ENGINEERS,**

Defendants.

Case No. 3:20-cv-03005-RS

**PLAINTIFFS' BRIEF RESPONDING
 TO THE COURT'S ORDER FOR
 ADDITIONAL BRIEFING**

Date: June 18, 2020
 Time: 1:30 pm
 Dept: San Francisco Courthouse,
 Courtroom 3 – 17th Floor
 Judge: Honorable Richard Seeborg
 Action Filed: 5/1/2020

INTRODUCTION

The States and Cities respond here to the Court’s request that the parties address the following question: “Does the existence of a specific statutory provision authorizing a court to stay the effective date of an agency rule have any effect on the considerations otherwise applicable when evaluating the propriety of a so-called ‘nationwide injunction’?” ECF No. 163. The stay that the States and Cities seek here under 5 U.S.C. § 705 would postpone the effective date of the 2020 Rule and apply nationwide. If this Court issues a stay under § 705 of the 2020 Rule’s effective date pending judicial review, the Court need not reach the States’ and Cities’ alternative request for a nationwide preliminary injunction.

A STAY UNDER 5 U.S.C. § 705 APPLIES NATIONWIDE

5 U.S.C. § 705¹ is an interim statutory remedy authorized by the Administrative Procedure Act (APA) that, by its plain terms, allows a court to delay the effective date of a rule pending resolution of judicial review. A stay under § 705 preserves the status quo prior to judicial determination that a rule must be vacated under § 706—the kind of vacatur that the States and Cities seek here. *See* ECF No. 1 (Complaint) (seeking order “declaring the 2020 Rule unlawful, setting it aside, and vacating it”).

Although courts have looked to similar factors to issue preliminary injunctions and stays under § 705, they are “different forms of relief.” *Washington v. United States Dep’t of Homeland Sec.*, 408 F. Supp. 3d 1191, 1212 (E.D. Wash. 2019) (granting nationwide stay under § 705 and preliminary injunction). Because a stay under § 705 “operates upon the judicial proceeding itself,” it differs from a preliminary injunction that “direct[s] the conduct of a particular actor.” *Id.* (quoting *Nken v. Holder*, 556 U.S. 418, 428 (2009)).

A stay of the 2020 Rule under § 705 would apply nationwide. That is because the scope of interim relief authorized by § 705 parallels the remedy of vacatur that this Court is authorized to issue under § 706—a remedy that would apply to the nationwide 2020 Rule, not solely to the

¹ Section 705 provides that “[o]n such conditions as may be required and to the extent necessary to prevent irreparable injury,” a court “may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.” 5 U.S.C. § 705. Unless otherwise specified, all citations to statutory sections are to Title 5 of the United States Code.

1 States and Cities challenging the Rule. *See* 5 U.S.C. § 706(2); *National Mining Ass’n v. U.S.*
 2 *Army Corps of Eng’rs*, 145 F.3d 1399, 1409-10 (D.C. Cir. 1998) (when “agency regulations are
 3 unlawful, the ordinary result is that the rules are vacated—not that their application to the
 4 individual [plaintiffs] is proscribed”). Accordingly, “§ 705 must be read to authorize relief from
 5 agency action for any person otherwise subject to the action, not just as to plaintiffs.” *D.C. v.*
 6 *U.S. Dep’t of Agric.*, — F. Supp. 3d —, No. 20-119 BAH, 2020 WL 1236657, at *34 (D.D.C.
 7 Mar. 13, 2020) (ordering nationwide relief after conducting comprehensive analysis of judicial
 8 authority to issue a stay under § 705).

9 To the extent the Agencies argue in their supplemental briefing that any § 705 stay should
 10 be “narrowly tailored,” their failure to present evidence showing how the court could “craft a
 11 limited stay” warrants “stay[ing] the Final Rule in its entirety.” *Texas v. EPA*, 829 F.3d 405, 435
 12 (5th Cir. 2016) (granting § 705 stay and rejecting EPA’s argument for more narrow remedy).
 13 Indeed, courts have rejected similar arguments recently raised by federal agencies that a rule
 14 should be “set aside only as to the plaintiffs,” reasoning that:

15 [T]he Court would be at a loss to understand what it would mean to vacate a
 16 regulation, but only as applied to the parties before the Court. As a practical
 17 matter, for example, how could this Court vacate the Rule with respect to the
 18 organizational plaintiffs in this case without vacating the Rule writ large? What
 would it mean to ‘vacate’ a rule as to some but not other members of the public?
 What would appear in the Code of Federal Regulations?

19 *O.A. v. Trump*, 404 F. Supp. 3d 109, 153 (D.D.C. 2019); *see also New Mexico Health*
 20 *Connections v. HHS*, 340 F. Supp. 3d 1112, 1183 (D.N.M. 2018) (“The Court does not know how
 21 a court vacates a rule only as to one state, one district, or one party. The [federal government’s]
 22 lawyer advised that he was not sure if the department had ever asked for relief to be limited to one
 23 state before doing so in this case and did not know of anyone else in the United States asking for
 24 such relief.”). Likewise, here, a § 705 stay that is geographically limited would result in a
 25 regulatory patchwork that fails to afford the States and Cities complete interim relief against the
 26 harms that will befall them if the 2020 Rule takes effect. ECF No. 30 (Plaintiffs’ Motion for
 27 Preliminary Injunction or Stay) at 39-40; ECF No. 148 (Plaintiffs’ Reply to Agencies in Support
 28 of Motion) at 24-25; ECF No. 165 (Plaintiffs’ Reply to State Intervenors in Support of Motion) at

11-20. Moreover, allowing a federal rule to take effect with respect to all but the States and Cities risks entrenching unlawful policies that will become more difficult or costly to replace and unwind later if those plaintiffs ultimately prevail on the merits and the challenged rule is vacated. *See D.C.*, 2020 WL 1236657, at *35 (rejecting geographic limitations urged by federal agencies that would allow rule to be implemented in “two dozen states” because once the “‘egg has been scrambled,’ ‘restor[ing] the status quo ante’ will be considerably more disruptive”).

Nor can the Agencies argue that this Court lacks authority under § 705 to issue nationwide relief. Where Congress wished to cabin courts’ authority to issue a stay under § 705, it said so expressly. *See, e.g.*, 16 U.S.C. § 1855(f)(1)(A) (§ 705 “not applicable” to judicial review of fishery-management regulations); 15 U.S.C. § 3416(b) (same for natural gas regulations). The absence of any such limitation as to geography indicates this Court can rely on § 705 to do exactly what Congress authorized—postpone the effective date of the 2020 Rule nationwide “pending conclusion of the review proceedings.” 5 U.S.C. § 705. Indeed, any objection by the Agencies to the issuance of a nationwide stay here “should be seen for what it is: a bold and bald-faced effort to restrict the exercise of Article III judicial power to aggrandize that of the executive branch.” *D.C.*, 2020 WL 1236657, at *39 (citing Mila Sohoni, *The Lost History of The “Universal” Injunction*, 133 HARV. L. REV. 920, 996 (2020)).²

Moreover, both the Agencies and State Intervenors have invoked § 705 to stay regulations nationwide. In 2016, several State Intervenors obtained a § 705 stay of an EPA rule “in its entirety” over EPA’s objections. *Texas*, 829 F.3d at 435. They also obtained a § 705 stay of the Clean Power Plan. *West Virginia v. EPA*, 136 S. Ct. 1000 (2016).³ EPA has also repeatedly invoked § 705 to postpone the effective dates of its own rules on a nationwide basis. *See, e.g.*,

² *See also* Brief for Professor Mila Sohoni as *Amica Curiae* Supporting Respondents, *Trump v. Pennsylvania*, 140 S. Ct. 918 (No. 19-454), 2020 WL 1877916.

³ In contrast, when the State Intervenors challenged the 2015 Rule, they requested only injunctive relief and not stays under § 705. *See* Memorandum in Support of Motion for a Preliminary Injunction, *Georgia v. McCarthy*, Case No. 2:15-cv-79 (S.D. Ga. July 25, 2015) (ECF No. 32); States’ Memorandum in Support of Motion for Preliminary Injunction, *North Dakota v. U.S. Envtl. Prot. Agency*, Case No. 3:15-cv-59 (N.D. Aug. 10, 2015) (ECF No. 33); States’ Memorandum in Support Motion for Preliminary Injunction *Texas v. EPA*, Case No. 3:15-cv-162 (S.D. Tex. Feb. 12, 2016) (ECF No. 40).

1 *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 21-22 (D.D.C. 2012).⁴

2 Finally, courts that have considered interim relief in recent challenges to agency rules have
 3 granted *both* § 705 stays and preliminary injunctions “without geographic limitation”; these
 4 courts reason that a preliminary injunction against enforcement of the rule is a proper alternative
 5 remedy should a court of appeal “determine[] that a section 705 stay is not appropriate.”
 6 *Washington*, 408 F. Supp. 3d at 1223; *D.C.*, 2020 WL 1236657, at *32. While the States and
 7 Cities here seek a stay or, in the alternative, preliminary injunctive relief, these cases confirm that
 8 the remedy provided by a § 705 stay may be issued prior to or in conjunction with a nationwide
 9 preliminary injunction.

10 Thus, the stay that the States and Cities seek here of the 2020 Rule’s effective date under
 11 § 705 would be nationwide. As shown in the States’ and Cities’ motion and reply briefs, either a
 12 stay or a nationwide preliminary injunction is necessary to prevent the irreparable harm that the
 13 State and Cities will suffer if the 2020 Rule goes into effect.

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 22 ⁴ The following is a partial list of § 705 postponements that have stayed the entirety of a
 23 rule (or provided stays to specific regulatory provisions in a rule) on a nationwide basis: 79 Fed.
 24 Reg. 26,297 (May 7, 2014) (SEC); 76 Fed. Reg. 59,896 (Sept. 28, 2011) (Dep’t of Labor); 73
 25 Fed. Reg. 67,107 (Nov. 13, 2008) (EPA); 69 Fed. Reg. 19,937-39 (Apr. 15, 2004) (EPA); 66 Fed.
 26 Reg. 27,863-64 (May 21, 2001) (Dep’t of Labor); 66 Fed. Reg. 20,191 (Apr. 20, 2001) (Dep’t of
 27 Energy); 60 Fed. Reg. 54,949 (Oct. 27, 1995) (EPA); 60 Fed. Reg. 50,426-28 (Sept. 29, 1995)
 28 (EPA); 60 Fed. Reg. 26,828 (May 19, 1995) (EPA); 60 Fed. Reg. 22,228 (May 4, 1995) (EPA);
 55 Fed. Reg. 10,455-56 (Mar. 21, 1990) (EPA); 57 Fed. Reg. 22,178 (May 27, 1992) (EPA); 57
 Fed. Reg. 5,859-61 (Feb. 18, 1992) (EPA); 56 Fed. Reg. 43,874-77 (Sept. 5, 1991) (EPA); 56
 Fed. Reg. 27,332-36 (June 13, 1991) (EPA); 56 Fed. Reg. 19,951-52 (May 1, 1991) (EPA); 56
 Fed. Reg. 1,556-57 (Jan. 15, 1991) (EPA); 55 Fed. Reg. 38,057-58 (Sept. 17, 1990) (EPA); 55
 Fed. Reg. 29,205-06 (Mar. 15, 1990) (EPA); 54 Fed. Reg. 4,021-22 (Jan. 27, 1989) (EPA); 48
 Fed. Reg. 45,537-38 (Oct. 6, 1983) (Fed. Trade Comm’n); 46 Fed. Reg. 2,975-76 (Jan. 13, 1981)
 (FERC).

Dated: June 16, 2020

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**Application for admission pro hac vice
forthcoming.*

CERTIFICATE OF SERVICE

Case Name: **State of California, et al. v. Andrew R. Wheeler, et al.**

Case No.: **3:20-cv-03005-RS**

I hereby certify that on June 16, 2020, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

PLAINTIFFS' BRIEF RESPONDING TO THE COURT'S ORDER FOR ADDITIONAL BRIEFING

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 16, 2020, at Los Angeles, California.

Ernestina Provencio

Declarant

/s/ Ernestina Provencio

Signature